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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JACOB B. et al., Persons Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

F.P.,

Defendant and Appellant.

G042503

(Super. Ct. Nos. DP016830,
DP016831 & DP016832)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jane
L. Shade, Temporary Judge. (Pursuant to Cal. Const. art. VI, § 21.) Affirmed.

Patricia K. Saucier, under appointment by the Court of Appeal, for
Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Debbie
Torrez, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

F. P. appeals from a judgment terminating her parental rights to her sons Jacob, Joseph and Joshua. She contends the juvenile court erred in failing to apply the so-called “benefit exception” to termination (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i), formerly subd. (c)(1)(A)), but we disagree and affirm the judgment.

FACTS

F. has a history of drug use and domestic violence. In early 2008, she and her sons moved into the back room of a dirty, drug infested house in Westminster. When the police searched the house a few months later, they found numerous narcotics and weapons. F. was not arrested in connection with the search, but her sons (then ages six, four and one) were taken into protective custody and dependency proceedings were commenced.¹

F. was granted twice weekly visitation, and as part of the reunification plan, she was required to submit to drug testing, enroll in a narcotics treatment program and take parenting and domestic violence classes. In the first month of the case, she only visited the boys on one occasion. Although the children were very attached to her at that time, F.’s priorities were elsewhere. It wasn’t long before she returned to the drug scene and started missing her visitation appointments. By the time the children were placed in a foster home in June 2008, she had not made any progress on her case plan.

On June 16, the children waited an hour for her to show up for a scheduled visit. When efforts to reach her were unsuccessful, the visit was canceled and the children took it hard. The oldest, Jacob, told the social worker he was mad at his mother, and four-year-old Joseph was so upset he refused to answer any questions; he just curled up into the fetal position, sucked his thumb and acted like a baby. F. later explained she missed the visit because she overslept.

¹ F. was separated from the boys’ father at the time. He did not participate in the proceedings below and is not a party to this appeal.

The following month, F. discovered she was pregnant with her boyfriend's child. This prompted her to enroll in a drug treatment program, and in August 2008 she visited the children five times. However, she did not visit them at all in September or October. By then, she had been discharged from her drug program for not attending classes, missing numerous drug tests, and failing to meet with her counselor. She did test clean on a few of her drugs tests, but she also submitted a number of diluted samples, which were treated as failed tests.

When she did show up for the visitation, the boys were generally eager to see her. She usually brought them food and would start out by playing with them or reading them stories. But as the visits wore on, she tended to become detached and distant and would often end up just watching them play. She was also quite neglectful of the children at times, losing track of Joshua on one occasion, and failing to comfort him after a fall on another. She allowed the boys to use public restrooms unattended and sometimes brought her boyfriend and his pit bull along on the visits, even after being told this was inappropriate.

Although F. missed many of her scheduled visits with the children, she did call them about once a week. Some of the calls lasted up to 40 minutes, with the boys telling F. they loved her at the end. The calls seemed to rekindle F.'s desire to see the children, but her visitation attendance continued to be spotty, and she was not very reliable in terms of communicating with the social worker. After missing a scheduled visit in November 2008, she initially said it was because her boyfriend had the flu. Then she claimed she had been in a car accident on the way to the meeting, although she couldn't remember the time of the accident or confirm it had occurred. When questioned on the discrepancy, she said both of these things had happened.

In December 2008, she told the social worker she wanted the foster family to adopt the children because they were happy and in a stable home. At that time, she was living with her boyfriend in a motel and did not know how long they would be living

there. A week later, she missed another scheduled visit, having once again overslept, and the visit was rescheduled. However, she missed that meeting, too, without providing any explanation. Jacob made excuses for F.'s infrequent visits, saying she was trying to find a job. He said he wanted to be returned to her custody, but, on balance, he and his brothers were happy and doing well in the care of their foster parents.

By the time of the six-month review hearing in January 2009, F. changed her mind about reunification and said she wanted to try to get the children back again. However, the court terminated her reunification services and scheduled a hearing to decide on a permanent placement plan for the boys. Since their foster parents were not interested in adopting them, a search for suitable adoptive parents was begun. All three boys were determined to be adoptable.

F. visited them on January 31, 2009, and twice a month starting in February. While they still seemed happy to see her at the start of the visits, they spent most of their time playing by themselves while F. watched on or played a video game. At the end of the visits, the foster parents needed to remind them to say good-bye to their mother. The two younger boys tended to look to Jacob, not F., for their emotional comfort and support.

In April 2009, F. gave birth to a baby boy in Riverside County, where she was living with her boyfriend's parents. Although the baby tested clean for drugs, F. was required to participate in a service plan with Riverside's child protection agency in order to retain custody of him.

Meanwhile, her three children involved in this case were placed with prospective adoptive parents. They appeared to be happy and were open to the idea of adoption. F. continued to visit them twice a month, and she also called them about once a week. However, her parenting skills were still lacking in many respects. During visits, she rarely gave the children anything other than candy, and there were times when Joshua hurt himself or wandered off, and the monitor was forced to intervene; when his diaper

was dirty, she generally ignored the problem. Although she did try to discipline the children at times, she seemed largely incapable of managing all three of them at once.

In August 2009, on the eve of the permanent placement hearing, F. brought a motion to renew her reunification services on the grounds of changed circumstances. In support of the motion, she alleged she was participating in her Riverside case and had been sober for nearly two months. She also submitted declarations from the foster parents in which they alleged that the boys missed, and wanted to be returned to, their mother. The court determined F.'s circumstances were in the process of changing, but had not actually changed to the point where modifying the case plan would be in the best interest of the children. While recognizing F.'s recent progress, the court noted she was still months away from completing any of her programs. The court was also concerned with the fact she had waited about six months after her reunification services were terminated before making a dent in her case plan. And even then, her apparent motivation was to preserve custody of her new baby, not reunify with her three older children. Therefore, the court denied her request for additional reunification services and proceeded with the permanent placement hearing.

At the hearing, the court heard from Jacob and Joseph, who were then eight and six years old, respectively. Although they both said they wanted to go back to their mother, Jacob said he wanted to wait a month before doing so because, in his mind, a month was a long way away. He said he was quite happy living with his prospective adoptive parents because they took good care of him. He also said it would be okay if they adopted him, so long as he could visit F.

The foster parents testified there was a strong bond between F. and the boys. They also said the boys routinely expressed their desire to be with their mother. However, the social workers had a different take on things. They did not believe the boys had a significant bond with F. or constantly longed to be with her. Resolving this conflict

in the testimony, the court found the social workers to be more credible, due to a number of inconsistencies in the foster parents' testimony.

The court also noted that all three boys appeared to be bonded with the prospective adoptive parents. In fact, they had taken to calling them mom and dad, and the prospective adoptive parents were eager to adopt them. Balancing this prospect against F.'s lack of progress on her case plan and her difficulty in caring for the children, the court determined the children would benefit more from adoption than being returned to her care. Accordingly, it terminated F.'s parental rights and freed the children for adoption.

DISCUSSION

F. contends the court should have preserved her parental rights by invoking the so-called "benefit exception" to termination. However, we uphold the court's decision not to do so.

The benefit exception applies where the parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i), formerly subd. (c)(1)(A).) The relationship must promote "the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

In this regard, it is important to remember, "Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

In determining whether there is substantial evidence to support the trial court's refusal to apply the exception in this case, "we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

There is little question F. and her children were bonded to each other when the case first arose. In fact, during their initial visit, the youngest child clung to F., and when F. failed to show up for a subsequent visit around this time, the older boys reacted in a strongly negative manner to her absence. But despite being granted twice weekly visitation, F. only saw the boys eight times during the first eight months of the case, with most of those visits coming during a single month, August 2008. While she did call them on a fairly regular basis, the evidence suggests her lack of personal contact with the children took a toll on their relationship.

By January 2009, the children still seemed to like the idea of visiting their mother. But upon seeing her, they greeted her half-heartedly before going off to play on their own. And when it came time for them to go, the foster parents had to remind them to say good-bye. Even F. withdrew from the children by the end of the visits, opting to play video games by herself rather than paying attention to what her children were doing. Throughout the case, she simply had a great deal of difficulty assuming a parental role and consistently demonstrating appropriate parental behavior in the children's presence. Her visitation record was rather dismal and the quality of her visits left a lot to be desired.

As it turned out, the evidence most favorable to F. came from the children's foster parents. They were quite adamant in their belief that the boys were strongly bonded to F. and greatly desired to be with her. But the trial court found the foster parents' testimony inconsistent and determined they were not a reliable source of information. As noted above, we are not at liberty to second-guess this assessment.

At the permanent placement hearing, the two older boys did make it clear that they love their mother and wanted to be with her. However, Jacob said he wanted to live with her a month in the future, which he described as being a long time away. He also said he enjoyed living with his prospective adoptive parents, and it would be okay if they adopted him, so long as he could still visit F. Both boys said they would feel bad if they never saw their mother again, but they also said they would feel bad if they never saw their foster parents again.

The fact is, the foster parents and the prospective adoptive parents gave the children something F. has never been able to provide for them — a safe and stable environment in which they can reach their developmental goals. Despite numerous opportunities for improvement, F. squandered her chances for reunification by falling back into old patterns of neglect and abuse. Although the case went on for over a year, she failed to overcome the problems that led to the children's detention, and beyond that, there is little to suggest the benefit the children would derive from being in her care would be anything more than incidental. The record is devoid of any significant, continuing attachment between F. and her children. (Compare *In re S.B.* (2008) 164 Cal.App.4th 289 [benefit exception deemed applicable where father complied with his case plan, regularly visited his child, and had a significant positive relationship with the child].)

For all these reasons, we cannot conclude the trial court erred in terminating her parental rights and freeing the children for adoption. The trial court's conclusion the benefit exception did not apply is supported by substantial evidence and was entirely reasonable under the circumstances presented.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.